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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. ~~74~~-220

COMMONWEALTH OF KENTUCKY, EX REL
ED W. HANCOCK,
ATTORNEY GENERAL, ... PETITIONER,

versus

RUSSELL E. TRAIN, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION
AGENCY, ET AL ..... RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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RUSSELL E. TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY; JACK E. RAVAN, REGIONAL ADMINISTRATOR, REGION IV, ENVIRONMENTAL PROTECTION AGENCY; ENVIRONMENTAL PROTECTION AGENCY; GENERAL CREIGHTON ABRAHAMS, CHIEF OF STAFF, UNITED STATES ARMY, UNITED STATES OF AMERICA; ROBERT F. FROEHLKE, SECRETARY, DEPARTMENT OF THE ARMY, UNITED STATES OF AMERICA; MAJOR GENERAL W. R. DESBORY, COMMANDER GENERAL, UNITED STATES ARMY ARMOR CENTER AND FORT KNOX; MAJOR GENERAL JOHN CUSHMAN, COMMANDING GENERAL, 101st AIRBORNE DIVISION (AIRMOBILE) AND FORT CAMPBELL; COLONEL ERNEST A. VULEY, JR., COMMANDING OFFICER, LEXINGTON-BLUEGRASS ARMY DEPOT, DEPARTMENT OF THE ARMY; DEPARTMENT OF THE ARMY, UNITED STATES OF AMERICA; AUBREY J. WAGNER, CHAIRMAN, BOARD OF DIRECTORS, TENNESSEE VALLEY AUTHORITY; LYNN SEEBER, GENERAL MANAGER, TENNESSEE VALLEY AUTHORITY; J. L. McPHERSON, SUPERINTENDENT, SHAWNEE POWER PLANT, TENNESSEE VALLEY AUTHORITY; T. E. CAVANISS, SUPERINTENDENT, PARADISE POWER PLANT, TENNESSEE VALLEY AUTHORITY; TENNESSEE VALLEY AUTHORITY; JAMES R. SCHLESINGER, CHAIRMAN, BOARD OF DIRECTORS, ATOMIC ENERGY COMMISSION; ROBERT E. HOLLINGSWORTH, MANAGER, ATOMIC ENERGY COMMISSION; B. W. STILLER, MANAGER, PADUCAH GASEOUS DIFFUSION PLANT, ATOMIC ENERGY COMMISSION; UNION CARBIDE CORPORATION, A NEW YORK CORPORATION; ATOMIC ENERGY COMMISSION ..... RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner Commonwealth of Kentucky, ex rel Ed W. Hancock, Attorney General, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals For the Sixth Circuit rendered in these proceedings on June 5, 1974.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, as yet unreported, appears at Appendix A, infra, pp 1a-21a. The opinion of the United States District Court for the Western District of Kentucky is reported at 362 F. Supp. 360 (1973), and appears at Appendix B, infra, pp 22a-35a.

JURISDICTION

The Judgment of the Court of Appeals for the Sixth Circuit (Appendix A, infra, pp 1a-21a) was entered on June 5, 1974. This Petition For Writ of Certiorari was filed less than ninety days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The jurisdiction of the District Court was invoked because the question arose under the Clean Air Act, as amended, 42 U.S.C. §1857, et seq., a Federal statute relating to the environment. The questions with respect to this statute presented in this Petition for Writ of Certiorari are as follows:

I. WHETHER THE COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN FINDING THAT AIR CONTAMINANT SOURCES OWNED, OPERATED, OR CONTROLLED BY THE FEDERAL GOVERNMENT WERE SUBJECT ONLY TO ACTIONS UNDER §304 OF THE CLEAN AIR ACT AMENDMENTS OF 1970, 42 U.S.C. §1857h-2?

II. WHETHER THE COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN FAILING TO FIND THE PERMIT REQUIREMENT CONTAINED IN KENTUCKY'S IMPLEMENTATION PLAN FOR THE ATTAINMENT AND MAINTENANCE OF NATIONAL AND STATE AMBIENT AIR QUALITY STANDARDS WAS A REQUIREMENT RESPECTING CONTROL AND ABATEMENT OF AIR POLLUTION WITHIN THE MEANING OF §118 OF THE CLEAN AIR ACT AMENDMENTS OF 1970, 42 U.S.C. §1857f?

III. WHETHER THE COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN RULING THAT THIS ACTION WAS BARRED BY THE DOCTRINE OF SOVEREIGN IMMUNITY AND THE SUPREMACY CLAUSE?

IV. WHETHER THE JUDGMENT RENDERED BY THE COURT OF APPEALS FOR THE SIXTH CIRCUIT WILL BE A SERIOUS HINDRANCE TO THE EFFECTIVE ADMINISTRATION OF THE CLEAN AIR ACT, AS AMENDED, 42 U.S.C. §1857, ET SEQ.?

STATUTORY PROVISIONS INVOLVED

This case involves Section 101, Section 107, Section 110, Section 113, Section 116, Section 118, and Section 304 of the Clean Air Act Amendments of 1970; 81 Stat. 485, 84 Stat. 1678, 1680, 85 Stat. 464, 84 Stat. 1689, 1689, 1706; 42 U.S.C. §1857., §1857c-2, §1857c-5, §1857c-8, §1857d-1, §1857f., and §1857h-2. Also involved is Kentucky Administrative Regulation AP-1 §5, also promulgated in Chapter 7 of Kentucky's Implementation Plan for the Attainment and Maintenance of National and State Ambient Air Quality Standards. These are reprinted in pertinent part in Appendix C, pp. 36a-46a infra.

STATEMENT OF THE CASE

Pursuant to the Clean Air Act Amendments of 1970, the Commonwealth of Kentucky adopted Kentucky's Implementation Plan for the Attainment and Maintenance of National and State Ambient Air Quality Standards, (Hereinafter referred to as "The Kentucky Plan"), and submitted this plan to the Environmental Protection Agency for approval as required by the Act. "The Kentucky Plan" approved by the Environmental Protection Agency contains a requirement that the owners and operators of air contaminant sources in the Commonwealth of Kentucky obtain permits to operate such facilities. Section 118 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857f., provides that Federal facilities which operate

air contaminant sources "shall comply" with State "requirements respecting control and abatement of air pollution."

Defendants Tennessee Valley Authority, Department of the Army, Atomic Energy Commission, and Union Carbide Corporation all operate or control air contaminant sources within the Commonwealth of Kentucky. These defendants refused to apply for and obtain permits as required in "The Kentucky Plan" and the Environmental Protection Agency refused, and continues to refuse, to commence appropriate action. On November 16, 1972, this action was brought in the United States District Court For The Western District of Kentucky in an effort to compel the individual defendants, all officers responsible for the conduct of their respective agencies and facilities, to comply with the requirements of "The Kentucky Plan" and asking declaratory and injunctive relief restraining the defendants from refusing to comply with the provisions of 42 U.S.C. §1857f.

The District Court granted the defendants' Motion for Summary Judgment holding that a permit has absolutely nothing to do with air quality and that Section 118 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857f. did not require the defendants to obtain permits under "The Kentucky Plan."

The Court of Appeals for the Sixth Circuit upheld the Judgment of the District Court, noting that a permit was unnecessary since appellant had a remedy under Section 304 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857h-2.

REASONS FOR GRANTING THE WRIT

The Court of Appeals for the Sixth Circuit erred in its construction of the Clean Air Act, as amended, particularly with respect to Section 118 and Section 304 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857f. and §1857h-2. (Appendix C, *infra*) and the interrelation of those sections. The error in the reasoning of that Court is reflected in its conclusion that:

> "Congress intended that federal facilities comply with the emission standards and limitations of the state plan where they are located. Such compliance is mandated by Section 118 and made enforceable by legal action pursuant to Section 304. By defining the term 'emission standard or limitation' broadly in Section 304(f) Congress provided a means of enforcing all of the substantive provisions of a state plan, for prevention as well as after-the-fact violation." (Appendix B, *infra*)

In this statement the Court has ignored the fact that Section 118 does not mandate compliance with the "substantive provisions of a state plan" but rather requires compliance with State "requirements respecting control and abatement of air pollution." Further, it is unnecessarily strained and circuitous to say compliance with "substantive provisions of a state plan" is "mandated by Section 118 and made enforceable by legal action pursuant to Section 304" since Section 304 itself quite clearly "mandates" compliance with such requirements and provides for such legal action completely independent of Section 118. It is a well established rule of this Court, followed numerous times, that every provision of a

statute is to be construed, if possible, so as to give it operative meaning and a corollary that no section of a statute should be given a construction which will render it redundant or meaningless where another interpretation will give it effect.[1] In making the determination that the state may enforce only those parts of its implementation plan deemed "substantive provisions" the Court below has rendered Section 118 a mere restatement of Section 304 in contravention of this principle of construction. In addition, such an interpretation renders utterly without meaning Section 116 of the Clean Air Act Amendments of 1970, 42 U.S.C. § 1857d-1 (Appendix C, *infra*) which provides:

> ". . . nothing in this chapter shall preclude or deny the right of any state or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) ***any requirement respecting control or abatement of air polluation.***" (Emphasis Added).

This section indicates there is a difference between "requirements respecting control and abatement of air pollution" as used in Section 118 and "emission standard or limitation" as used in Section 304, for the section clearly demonstrates those phrases were not inter-changable and co-extensive in the minds of the Congress.

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1. *Washington Market Co.* v. *Hoffman*, 101 U.S. 112, 25 L.Ed. 782 (U.S. Dist. Col. 1879); *Jarecki* v. *G. D. Searle & Co.*, 81 S.Ct. 1579, 367 U.S. 303, 6 L.Ed. 2d 859 (U.S. Ill. 1961); *Weinberger* v. *Hynson, Westcott & Denning, Inc.*, 93 S.Ct. 2469 (U.S. Va. 1973).

Nor does an examination of the words used in Section 118 indicate or justify the restriction of the meaning of the phrase "requirements respecting control and abatement of air pollution" to include only those "requirements" which embody "emission standards or limitations" as defined in Section 304. The relevant portions of Section 118 read as follows:

> "Each department agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements."

Section 118 continues by providing that the President may grant facilities exemptions from any requirement.

The mandate of this section is clear; Congress has ordered unequivocally that the facilities of the Federal Government are to comply with "State . . . requirements respecting control and abatement of air pollution." The only limits on this command are that such facilities need only comply to the same extent as other persons and that the President may exempt compliance by affirmative action. No mention is made in this section of an exemption from all requirements save "emission standards or limitations." However, it is exactly that exemption which the District Court and the Circuit Court of Appeals have written into the law with their Opinions. This is not the

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proper function of the judiciary. As was stated in the case of *62 Cases, More or Less, Each Containing Six Jars of Jam* v. *United States*, 340 U.S. 593, 71 S.Ct. 515, 95 L.Ed. 566 (U.S. N.M. 1951):

> "In construing a statute, the United States Supreme Court must construe what Congress has written, and cannot add, substract, delete or distort words used."

In this case what Congress has written is an uncompromising command to comply with State "requirements;" there is absolutely no language in this section indicating there are to be certain "requirements" imposed on "any person" for which compliance by Federal facilities is not required.

The District Court and the Circuit Court of Appeals have, however, gone beyond the natural and common import of the words which the Congress wrote, and have looked elsewhere for a clarification of "requirements respecting control and abatement of air Pollution." In past decisions this Court has indicated that in such circumstances the Court should examine the purpose for the statutory enactment; that is, the Court should strive to identify the "evil" with which the enactment seeks to deal.[2] When the enactment is an amendment to an existing act it seems obvious to look to the provision which Congress found inadequate and which was changed in order to determine the purpose of the change.

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2. *Platt* v. *Union Pacific R. Co.*, 99 U.S. 48 (1878); *U. S.* v. *Katz*, 271 U.S. 354 (1926); *Shapiro* v. *U. S.*, 335 U.S. 1 (1948).

Prior to the enactment of Section 118 of the Clean Air Act Amendments of 1970, the Congress had required a program of voluntary cooperation in the area of air pollution by Federal agencies, embodied in Section 111 of The Air Quality Act of 1967, P.L. 90-148:

"COOPERATION BY FEDERAL AGENCIES TO CONTROL AIR POLLUTION FROM FEDERAL FACILITIES

"SEC. 111. (a) It is hereby declared to be the intent of Congress that any Federal department or agency having jurisdiction over any building, installation, or other property shall, to the extent practicable and consistent with the interests of the United States and within any available appropriations, cooperate with the Department of Health, Education, and Welfare and with any air pollution control agency in preventing and controlling the pollution of the air in any area insofar as the discharge of any matter from or by such building, installation, or other property may cause or contribute to pollution of the air in such area."

What is immediately apparent from this provision is that in enacting Section 118 the Congress intended a radical change from the provisions of previous law; an examination of these two provisions clearly indicates that Congress wished to depart from an ineffective program of voluntary cooperation and move instead to a program of mandatory compliance. If, in making such a change, the Congress had desired to make only compliance with "emission standards or limitations" mandatory it need only have so stated. Obviously, this was not the statement made in Section 118, and, moreover, this was not the statement made in either the Senate nor the House versions. The Senate version of this section would have directed each Federal agency to "comply with the requirements of this Act in the same manner as any other person would so comply. . . ."[3] The House version would have required compliance with "applicable Federal, State, interstate, and local emission standards and with the purpose of this Act. . . ."[4] In neither case is there a simple statement that these facilities need only comply with "emission standards and limitations." Both versions raise questions concerning additional requirements relative to "the purpose of this Act," and the manner of compliance by "any other person," however, the District Court and the Circuit Court of Appeals each conclude based on this authority that "requirements respecting control and abatement of air pollution" are nothing more than "emission standards or limitations." This conclusion is clearly not warranted; as this Court stated in *Ex Parte Collett,* 337 U.S. 55, 69 S.Ct. 944, 93 L.Ed. 1207, (U.S. Ill. & Ky., 1949):

"The plain words and meaning of a statute cannot be overcome by legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction."

The search for the intent of Congress cannot end, however, with an examination of the purpose of a single

3. H. R. 17255, 91st Cong., 2d Sess., Sec. 111 (1970).

4. S 4358, 91st Cong., 2d Sess., Sec. 118 (1970).

section, it is necessary to see if that provision is consistent with the goals of the Act and the statutory plan for the accomplishment of those goals. The goals of the Clean Air Act as a whole are embodied in Section 101(b) of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857 (b) (Appendix C, *infra*):

> "(b) The purposes of this title are —
>
> "(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;
>
> "(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;
>
> "(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and
>
> "4) to encourage and assist the development and operation of regional air pollution control programs."

Clearly, then, one of the primary goals of the Act was to develop a "program" designed to achieve the "prevention and control of air pollution." That the air pollution prevention and control programs envisioned by the Act were to be State programs is clearly illustrated by the findings of the Congress embodied in Section 101 (a) of the Act, 42 U.S.C. §1857(a) (Appendix C, *infra*):

> "(3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments; and
>
> "(4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution."

These sections demonstrate the States are to have primary responsibility in the area of air pollution and that the Federal Government is to provide financial assistance and leadership in developing the State plans. In enacting the Clean Air Act, as amended, the Congress of the United States set out and prescribed a carefully conceived plan through which the control and prevention of air pollution was to be accomplished; a plan whose core concept was the development of state control and prevention programs utilizing *State* plans designed to implement minimum national standards of air quality. The specific mechanisms to be employed in this Congressional plan were set out in particular in other sections of the Act. In Section 107, 42 U.S.C. §1857c-2 (Appendix C, *infra*), the Congress reaffirms the State's responsibility and directs that each shall prepare a plan for meeting these responsibilities:

> "SEC. 107. (a) Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State."

The requirements for these "implementation plans" were set out in Section 110, 42 U.S.C. §1857c-5 (Appendix C, *infra*). The basic requirement contained in Subsection 110(a)(1), was that the plan "provide for

implementation, maintenance, and enforcement" of both the primary and secondary standards contained in the Act. Subsection 110(a) (2) required, in addition to "emission limitations, schedules, and timetables of compliance," that the plan:

> "(C) . . . includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator."
>
> "(F) . . . provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan, (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources, (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this Act, which reports shall be available at reasonable times for public inspection; and (v) for authority comparable to that in section 303, and adequate contingency plans to implement such authority;"

Clearly, these are requirements designed to give assurance that implementation plans adopted by the States are adequate *to enforce* the standards and *to implement* the necessary controls on air contaminant sources to accomplish the goals and purposes of the Act. The concern of Congress that such plans contain adequate assurance of enforcement capability shows they understand

that the mere existence of standards is utterly meaningless without a means of administering and enforcing these standards; their concern was that that the States actually be able to *implement* the standards and achieve the goals of the Act. This is the Congressional "plan"; the "plan" for achieving the goals of the Act and to provide for the enhancement of the quality of this Nation's air.

The decisions of the District Court and the Circuit Court of Appeals do violence to this carefully conceived and Congressionally enacted plan. For "The Kentucky Plan" is the embodiment of the Congressional scheme of control for all air contaminant sources in the Commonwealth of Kentucky. In ruling "requirements respecting control and abatement of air pollution" as contained in Section 118 referred only to "emission standards or limitations" as defined in Section 304 these Courts have thwarted the intent of Congress and have denied effect to every provision and requirement of "The Kentucky Plan" which they do not deem to be a "substantive requirement." These Courts have swept away all the provisions which the Congress so carefully required and enumerated to assure that the States had the ability to *implement* the standards.

Obviously, this ruling will have a significant, long-term and detrimental impact on the future administration of the Clean Air Act. Pursuant to the direction of the Congress the Commonwealth of Kentucky prepared and adopted an implementation plan setting forth the procedures to be followed in fulfilling its primary responsibility under the Act, the prevention and control of air

pollution at its source. This plan and the procedures it contains were submitted to, and approved by, the Environmental Protection Agency. "The Kentucky Plan" contains, among other requirements related to the administration and implementation of the Act, a permit requirement. This permit requirement, embodied in Section 5 of Kentucky Administrative Regulation AP-1 and promulgated in Chapter 7 of "The Kentucky Plan" is the basic control provision of the entire "Kentucky Plan." (Appendix C, *infra*). It is through the use of the permit system Kentucky is able to insure that proper air pollution control equipment is installed, it is the mechanism through which the Commonweatlh is able to compel the production of data concerning air contaminant sources, including the ability to prescribe the monitoring techniques to be employed, and is, therefore, a provision which is absolutely necessary to the Commonwealth of Kentucky in carrying out its plan for achieving the standards. However, notwithstanding the requirements in the Act that the States are to adopt *implementation plans*, the Court below concludes that the standards are to be *implemented* by the use of legal action under the Citizen suit provision of the Act, Section 304, 42 U.S.C. §1857h-2. The Court states:

> "The language of Section 304 does not require that suit be deferred until actual violation of an established emission standard occurs. Subsection (f)(1) clearly permits the filing of an action for violation of a schedule or timetable of compliance." (Appendix B, *infra*).

This proposed manner of implementation fails to consider, however, the manner in which "schedules or timetables of compliance" come into existence. There is *no single* such compliance schedule; it is necessary to determine what is required to bring each separate air contaminant source into compliance and then to design a schedule for the steps which need to be taken, a compliance schedule does not automatically come into being. The only known factors which relate to all compliance schedules are the attainment dates by which time all air contaminant sources are to be in compliance with the standards. In Kentucky, provision has been made, under its implementation plan, for prior review and approval of the compliance schedules of each air contaminant source in the state; this is done through the use of the permit system. Under "The Kentucky Plan" no permit may be issued to an air contaminant source unless that source is in compliance with the standards or is committed to an approved compliance schedule which will bring it into compliance by the attainment date. If after review of the nature of the source and the control measures to be incorporated it is determined that the compliance schedule will indeed put the source in compliance then the permit is issued with the compliance schedule as an enforecable condition; the schedules themselves, have no independent legal significance. Moreover, none of the sources involved in this action are at this time in any way legally committed to any compliance schedules; indeed not all of these sources have submitted plans under which they could be expected to meet the standards by the attainment dates.

The District Court and the Circuit Court of Appeals

have both blithely ignored the nature of compliance schedules and the manner in which they come into being. In doing so they have altered the entire nature of the Clean Air Act and placed a significant and onerous millstone around the administration of the Act. The most significant error which has been made by the Courts below is that they have failed to recognize that the Clean Air Act, as amended, is primarily a regulatory statute. The manner of implementation which the Courts below have ruled Congress intended is based on an entirely different philosophy and principle; the Act is to be implemented by use of the penal principle of arrest, trial, and punishment. This principle is antithetical to the principle of planned prevention and control.

Accomplishment of the goals of the Act requires planning and control over all sources of air pollution, for it is a fact of life in the United States today that few, if any, of the major sources of air pollution, including facilities operated by the Federal Government as well as private enterprise, are currently in compliance with minimum standards necessary to protect human health. In the face of this problem the rulings of the Courts below place the implementation of the Act under a system much better suited to dealing with instances of deviation from an accepted norm. What is needed in the area of air pollution control, and what was provided by the Congress in the Clean Air Act, is a system which is capable of raising the National norm to a new and higher standard.

The Act is geared to the regulation, control, and prevention of air pollution at its source; it provides for

administration, the gathering and assessing of data, the development, disemmination, and use of new technology, and it directs the formulation and employment of implementation *plans*. This requires a system of planning and review not possible without a means of controlling all air contaminant sources, including those operated by instrumentalities of the Federal Government.

The decision of the District Court denies the states such control:

> "It seems apparent, therefore, that Congress at all times contemplated a self imposed policy of Federal compliance with all applicable standards, but at no time contemplated subjecting Federal facilities to State procedures." (Appendix A, *infra*).

This ruling is echoed in the Opinion of the Circuit Court of Appeals:

> "We do not believe the congressional scheme for accomplishment of these purposes included subjection of federal agencies to state or local permit requirements. Congress did commit the United States to compliance with air quality and emission standards, and it is undisputed in this record that the federal facilities in Kentucky have cooperated with the Commission toward this end." (Appendix B, *infra*).

This action was filed and has been prosecuted with the sole purpose of securing for the Commonwealth the right to enforce the "air quality and emission standards" of the Act; it is absurd beyond belief to conclude there is nothing in the record to indicate that the Federal fa-

cilities in Kentucky have not cooperated with the enforcement of these standards. The rulings of the Courts below indicate that some of the major sources of air pollution in Kentucky are to regulate themselves. This means that in fulfilling its responsibilities under the Act the Commonwealth has no power to review the control measures to be used by these sources, and no place in the planning process but, rather must rely on the good intentions of the polluters themselves. This is not regulation as contemplated under the Act and this is not cooperation in meeting the standards. The states have been required to adopt elaborate plans to implement the standards, a regulatory plan which will enable the states to equalize the burdens of air pollution control among all the sources in a region. The Federal facilities in Kentucky have refused to abide by this plan; this is not cooperation in achieving the standards. These plans cannot be implemented or employed, instead the rulings of the Courts below and the position of the Federal facilities in Kentucky have reduced this Commonwealth to the role of policeman, catching violators and bringing them to justice in the courts. This was not the Congressional plan for the implementation of the standards.

In enacting Section 118 of the Clean Air Act Amendments of 1970 it was the intent of Congress to grant to the States a right commensurate with their responsibilities, the right to prevent and control air pollution at its source and to that end to exercise the requisite control over all sources within their boundaries. The command in Section 118 is clear and uncompromising in its generality and unmistakable in its thrust and intent; for purposes of air pollution

control, Federal facilities must comply with, and are subject to, the same requirements imposed on every other air contaminant source in the State. The "requirements" with which such facilities are to comply are the requirements which Congress was so careful to insure would be present in each State's implementation plan, the requirements which Congress referred to as "requirements respecting control and abatement of air pollution." This command, that these facilities "shall comply," has been thwarted by the decisions of the District Court and Circuit Court of Appeals, for in ruling there has been no waiver under the Supremacy Clause they have ruled that no command or mandate has been issued; that Section 118 does not create a mandatory and non-discretionary duty to comply in place of the system of voluntary cooperation which Congress intended to do away with.

The Court's reliance on the Supremacy Clause in this case is error. It is clearly the intent of Congress to subject Federal facilities to the State regulations involved. Also clear is the authority of Congress to waive the protection of this clause in terms of broad but uncompromising generality. Analagous in this regard is the case of *Baltimore National Bank* v. *State Tax Commissioner*, 297 U.S. 204 (1936) in which this Court ruled the Congress had consented to taxation of shares in a national bank which were held by an instrumentality of the Federal Government by enacting a statute which provided simply that "all" shares in such associations were taxable by the State in which the association had its principal place of business. Finally, the application of the Supremacy Clause in this case is contrary to the policy be-

hind the law, for far from being regulations which will frustrate Federal law, the evil against which the Supremacy Clause protects, the requirements contained in "The Kentucky Plan" are in furtherance of the goals of Federal law, and indeed were adopted pursuant to Federal law. See: *Perez et ux.* v. *Campbell,* 402 U.S. 637 (1971).

Likewise, the doctrine of sovereign immunity is inapplicable in the present case. It is well established that this doctrine is for the protection of officers of the soverign in the performance of their duties and that such protection does not extend to any actions of such individuals which are beyond his authority or in contravention of his duties. *Larson* v. *Domestic and Foreign Commerce Corporation,* 337 U.S. 682 (1949). In the present case the individuals against whom relief is sought have uniformly exceeded their authority in refusing to comply with the mandate of a Federal statute and are properly subject to suit for specific relief.

CONCLUSION

This action concerns the manner of the implementation of a Federal staute. The construction of the Clean Air Act embodied in the decisions rendered by the District Court and the Court of Appeals for the Sixth Circuit does violence to the carefully conceived plan of the Congress for the implementation of this Act and constitutes a significant interference with the administration of the States' Implementation Plans and the achievement of the goals of the Act. The Act provides that the States are to have primary jurisdiction in the area of air pollution and the Congress provided in Section 118 that the Federal facilities involved were to comply with State "requirements respecting control and abatement of air pollution." The body of these requirements, in the Commonwealth of Kentucky, are contained in its Implementation Plan, however, the Courts below have written into the law provisions exempting Federal facilities from compliance with this plan in contravention of the intent of Congress. The importance of this action to the achievement of the goals of the Act is reflected in the fact that there are currently pending in the Fifth[5] and Ninth[6] Circuits similar challenges to the refusal of the Federal Government to comply with the Congressional mandate of Section 118. In ruling that the provisions of this Commonwealth's Implementation Plan are not "requirements respecting control and abatement of air pollution" the Courts below have thrown out the provisions of this State's Congressionally required plan, and have exempted many of this State's major polluters from control, a result which severely hinders the administration of the Clean Air Act and the pur-

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5. *State of Alabama, et al,* v. *Lynn Seeber, et al,* Not Reported, File No. 73-2766, United States Court of Appeals, Fifth Circuit.

6. *California* v. *Statsny,* 4 ERC 1447, File No. 72-2905, United State Court of Appeas, Ninth Circuit.

pose and intent of Congress. For these and the foregoing reasons, this Petition for a Writ ot Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE:

The undersigned hereby certifies that the foregoing PETITION FOR WRIT OF CERTIORARI was served by mailing true copies hereof, postage prepaid, to: Honorable Robert L. Klarquist, Attorney, Appellate Section, Land and Natural Resources Division, Department of Justice, Washington, D. C. 20530; Honorable Martin Green, Chief, Pollution Control Section, Department of Justice, Washington, D. C. 20530; Honorable Wallace Johnson, Assistant Attorney General, Department of Justice, Washington, D. C. 20530; Honorable Walter Kiechel, Jr., Deputy Assistant Attorney General, Department of Justice, Washington, D. C. 20530; Honorable James A. Glasgow, Assistant Attorney General, Land and Natural Resources Division, Department of Justice, Washington, D. C. 20530; Honorable William Saxbe, Attorney General, United States of America, Washington, D. C. 20530; Honorable George J. Long, United States District Attorney, Western District of Kentucky, Room 211, United States Courthouse, Sixth and Broadway, Louisville, Kentucky, 40202; Honorable Jacques B. Gelin, Attorney, Appellate Section, Department of Justice, Washington, D. C. 20530; Honorable Kent Frizzell, Assistant Attorney General, Land and Natural Resources Division, Department of Justice, Washington, D. C. 20530; Honorable Herbert S. Sanger, Jr., Deputy General Counsel, Tennessee Valley Authority, Knoxville, Tennessee, 37901; Honorable Robert H. Marquis, Associate General Counsel, Tennessee Valley

Authority, Knoxville, Tennessee, 37901; Honorable Beauchamp E. Brogan, Associate General Counsel, Tennessee Valley Authority, Knoxville, Tennessee 37901; Honorable Justin M. Schwamm, Associate General Counsel, Tennessee Valley Autorithy, Knoxville, Tennessee 37901; Honorable G. Wilson Horde, General Counsel, Union Carbide Corporation, Post Office Box Y, Oak Ridge, Tennessee 37830; Honorable Andrew P. Miller, Attorney General, Commonwelath of Virginia, Supreme Court Building, 1101 East Broad Street, Richmond, Virginia 23219; Honorable Thomas Steger, Assistant Attorney General, Commonwealth of Virginia, Supreme Court Building, 1109 East Broad Street, Richmond, Virgnia 23219; Honorable Evelle Younger, Attorney General, State of California, 600 State Building, 217 West First Street, Los Angeles, California 90012; Honorable Jan Chatten Brown, Deputy Attorney General, State of California, 600 State Building, 217 West First Street, Los Angeles, California 90012; Honorable Robert H. O'Brien, Assistant Attorney General, State of California, 600 State Building, 217 West First Street, Los Angeles, California 90012; Honorable Nicholas C. Yost, Deputy Attorney General State of California, 600 State Building, 217 West First Street, Los Angeles, California 90012; Honorable John J. Hill, Attorney General, State of Texas, Post Office Box 12548, Austin Texas 78711; Honorable Larry F. York, First Assistant Attorney General, State of Texas, Post Office Box 12548, Austin, Texas 78711; Honorable Philip K. Maxwell, Assistant Attorney

General, State of Texas, Post Office Box 12548, Austin, Texas 78711; and Honorable James F. Gordon, United States District Judge, United States District Court, Western District of Kentucky, United States Courthouse, Sixth and Broadway, Louisville, Kentucky 40202; Honorable Paul C. Wieck, Circuit Judge, United States Court of Appeals For the Sixth Circuit, Honorable Pierce Lively, Circuit Judge, United States Court of Appeals For the Sixth Circuit, and Honorable Lester L. Cecil, Senior Circuit Judge, United States Court of Appeals For the Sixth Circuit, Cincinnati, Ohio 45202; all this the 26th day of August, 1974.

David C. Short

DAVID C. SHORT
Assistant Attorney General
Commonwealth of Kentucky

David D. Beals

DAVID D. BEALS
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APPENDIX

APPENDIX A

Rendered: 8-10-73
Entered: 8-13-73

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF KENTUCKY
AT LOUISVILLE

COMMONWEALTH OF KENTUCKY,
Ex Rel ED W. HANCOCK,
Attorney General, Plaintiff

v. Civil Action No. 7480-G

ROBERT FRI,
Acting Administrator,
Environmental Protection Agency,
et al, Defendants

MEMORANDUM AND ORDER

This suit, brought on behalf of the Commonwealth of Kentucky by State Attorney General Ed W. Hancock, raises an important question concerning the authority of the States to regulate Federal activities and installations[1]

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1. The Federal installations in question are: (1) Fort Campbell, Kentucky (home of the 101st Airborne Division); (2) Lexington-Bluegrass Army Depot, Lexington, Kentucky; (3) United States Army Armor Center and Fort Knox, Fort Knox, Kentucky; (4) Paducah Gaseous Diffusion Plant, Paducah, Kentucky, and (5) Installations operated by Tennessee Valley Authority.

under the Clean Air Act of 1970, 42 U.S.C. Section 1857 *et seq.* In general, the plaintiff asserts that Federal entities operating equipment or installation which emit air contaminants ***must secure a permit*** from the Kentucky Pollution Control Commission before operating such equipment. The permit requirement in question appears in Section 5 of the Kentucky Air Polution Control Commission Regulations AP-1. Section 5, which was part of the air implementation plan which Kentucky submitted to the Federal Government pursuant to Section 110 of the Clean Air Act of 1970, 42 U.S.C. Sec. 1857f provides in pertinent part as follows:

> (1) No person shall construct, modify, use, operate, operate, or maintain an air contaminant source or maintain or allow physical conditions to exist on property owned by or subject to the control of such person, resulting in the presence of air contaminants in the atmosphere, *unless a permit therefor* has been issued by the Commission and is currently in effect. (Emphasis ours.)

The plaintiff further alleges that "Kentucky's Plan became Federal law pursuant to Section 110, 113, and 118 of the Clean Air Act of 1970 . . . [and] Section 118 of the Clean Air Act of 1970 requires that "federal facilities' comply with approved Kentucky Plan . . ." Complaint, page 13.

In his prayer for relief, the Attorney General seeks

a mandatory injunction requiring the defendants[2], except for the Environmental Protection Agency and its defendant-officers, to "apply for and to obtain permits from the Kentucky Air Pollution Control Commission . . ." (Complaint p. 25). Also, a prohibitory injunction is sought restraining the defendants "from refusing to comply with the provisions of Section 118 of the Clean Air Act of 1970." (Complaint p. 25). With respect to the EPA and its officers, the prayer requests that they be "[o]rdered to commence appropriate action under Section 113 of the Clean Air Act of 1970 to obtain full compliance by the defendants . . . with the Kentucky plan . . ." A declaratory judgment and relief in the nature of mandamus are are also sought.

The TVA defendants moved to dismiss, or, in the alternative, for summary judgment. A motion to dismiss was filed by the non-TVA defendants. The plaintiff countered with a motion for summary judgment against the TVA defendants.

When these motions came on for hearing, it was apparent that it would be necessary, in the disposition thereof, that the Court consider matters in the nature of all affidavits and exhibits outside the pleadings. Rule 12b. F.R.C.P. Accordingly, it was agreed by all parties,

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2. All of the defendants except the Tennessee Valley Authority (TVA) and its officers were represented by the United States Department of Justice. The TVA was represented by its own attorneys. For clarity, the defendants are sometimes alluded to as (1) non TVA defendants; and (2) TVA defendants.

by counsel, that there being no issue of material fact as pertained to the legal defenses asserted, the Court without objection, considered the entire matter as on cross-motions for summary judgment.

Only issues of law are before this Court.[3] These issues are: (1) whether the Clean Air Act of 1970 requires that the defendants obtain state permits before operating equipment which emits substances into the ambient air and (2) whether the doctrine of sovereign immunity is a barrier to maintenance of this suit.

THE PERMIT ISSUE

Congress recognized that Federal facilities emitted appreciable amounts of various substances into the ambient air. Therefore, it provided in Section 118 of the

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3. The non-TVA defendants have submitted affidavits attesting that their installations, with a few minor exceptions which are being corrected, are in compliance with Kentucky's emission standards. The plaintiff has made contrary allegations. These factual disputes need not be tried, however, since matters of law control the disposition of the case. TVA has submitted to Kentucky detailed information concerning emissions from its facilities as required by Kentucky and in the form requested. TVA has also submitted plans and schedules for complying with Kentucky's emission standards. In furnishing such information, however, TVA informed Kentucky that while TVA fully intends to comply with its obligations under Section 118 of the Clean Air Act, those obligations do not include securing of state permits (Affidavit of Lynn Seeber). TVA accordingly has not applied for or obtained permits.

Clean Air Act for control of pollution from Federal facilities. In pertinent part. Section 118 provides as follows:

> Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements.

The question which is squarely before this Court is whether Congress intended, by enacting Section 118, to require the Federal Government to obtain permits from state agencies before operating equipment which generated air contaminants. Since this question must be answered in the negative, the defendants' motions must be granted.

All defendants contend that the requirement, in Section 118, that Federal entities "comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution" simply means that Federal facilities must comply with the emission standards and implementation plans of Sections 109 and 110 of the Act and, except for new facilities, the monitoring and other requirements of Section 114. The legislative history of the Act supports the defendants' interpretation of Section 118.

The Clean Air Act of 1967, 77 Stat. 392, Section 111, required that Federal agencies shall "to the extent

practicable and consistent with the interest of the United States and within any available appropriations, cooperate with the Department of Health, Education and Welfare and with any air pollution control agencies in preventing and controlling the pollution of the air . . ." This provision was changed by the Clean Air Act Amendments of 1970. The following analysis of the legislative history of Section 118 of the Clean Air Act provides an indication of Congress' intent concerning the change from the provision in the 1967 Act to the one in the 1970 Amendments.

On June 10, 1970, the House of Representatives passed H.R. 17255, a bill to amend the Clean Air Act of 1967. This bill would have required each Federal agency to "comply with the applicable Federal, State, interstate, and local *emission standards* and with the purpose of this Act . . ." [emphasis supplied]. H.R. 17255, 91st Cong., 2d sess., sec. 111 (1970). The House Report on the bill states, "The legislation directs Federal agencies in the executive, legislative and judicial branches to comply with applicable Federal, State, interstate, and local emission standards." H.Rept. No. 91-1146, 91st Cong., 2d sess., p. 4 (1970). On September 22, 1970, the Senate passed S. 4358, a different bill to amend the Clean Air Act of 1967. The bill would have directed each Federal agency to "comply with the *requirements* of this Act in the same manner as any other person would so comply . . ." [emphasis supplied]. S. 4358, 91st Cong., 2d sess. sec. 118 (1970) The Senate Report on the bill states, "This section requires that Federal facilities meet the *emission standards* necessary to achieve ambient air

quality standards as well as those established in other sections of Title I" [emphasis ours]. S. Rept. No. 91-1196, 91st Cong., 2d sess., p. 23 (1970). Other sections of Title I of the Senate bill set forth emission standards for "new sources" (§112), "selected air pollution agents" (§114), "hazardous air pollution agents" (§115), and inspection, monitoring and entry provisions (§116). The above statement from the Senate Report clearly indicates that the "requirements" which the Senate bill would have Federal facilities comply with were the substantive emission "standards" set forth in the Act and other Title I provisions. The Senate bill did not require, any more than the House bill, Federal compliance with State procedures. Both the House and Senate language were changed by the Conference Committee. The new language, which was enacted by Congress, requires Federal facilities to "comply with Federal, State, interstate and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements." Concerning this new language, the Conference Report states, "The House bill and the Senate amendment declare that Federal departments and agencies should comply with applicable standards of air quality and emission." H. Rept. No. 91-1783, 91st Cong., 2d sess., p. 48 (1970).

It seems apparent, therefore, that Congress at all times contemplated a self imposed policy of Federal compliance with all applicable standards, but at no time contemplated subjecting Federal facilities to State procedures. If Congress had intended to abandon the well

established doctrine, which has its basis in the Supremacy Clause, that the Federal Government is immune from attempts by states to subject it to state regulatory measures,[4] it would have so stated.

It must be noted, moreover that, Congress was sensitive to the issue of federal-state relations in enacting the Clean Air Act and, in a number of instances, expressly stated the manner in which Federal and State authority would interact in the case of Federal facilities. Since Congress expressly granted authority to the states concerning some aspects of the Clean Air Act's impact on Federal facilities, the plaintiff's argument is, in essence, based on the contention that certain other grants of authority to the states must be implied from the phraseology of Section 118 of the Act. Such an argument flies in the face of the principle that, where a particular provision appears in a statute, the failure to include that same requirement in another section of the statute will not be deemed to have been inadvertent. 2 J. Sutherland, *Statutory Construction* sec. 4915 (3 ed. 1943).

Cases decided to date which support the conclusion arrived at herein include *California* v. *Stastny*, 4 ERC 1447 (C.D. Calif. 1972), appeal pending 9th Circuit, and an unreported order in *State of Alabama, et al* v. *Seeber, et al* (N.D. Ala., No. 72-939), June 5, 1973. Notice of appeal filed June 28, 1973. In *Stastny*, the court held

4. Eg.*McCullogh v. Maryland*, 4, Wheat, 316, 436 (1819); *Ohio v. Thomas*, 173 U.S. 276 (1899); *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187 (1956).

that "[d]efendants are not required to either apply for or obtain permits from the Air Pollution Control District prior to operating or using any equipment or machines at the naval base at Long Beach, California." 4 ERC at 1448. In *Seeber*, the court dismissed a complaint which was quite similar to the one at bar.

We further note that a permit has absolutely nothing to do with air quality. The substantive requirements of the implementation plan (*e.g.*, emission standards and compliance schedules) do, and it is those "requirements" which are essential to the improvement of air quality and are, we believe, the "requirements" which are essential to the improvement of air quality and are, we believe, the "requirements respecting control and abatement of air pollution" to which section 118 of the Clean Air Act refers.

THE CLAIM AGAINST THE EPA

In its second claim for relief, the plaintiff contends that the defendant Ruckelshaus,[5] Ravan and the Environmental Protection Agency have violated Section 113 of the Clean Air Act, U.S.C. sec. 1857c-8, by failing "to commence appropriate actions . . . to compel compliance with the Kentucky Plan as to permits to operate, time

5. Pursuant to Rule 25(d) (1) F.R.Civ.P., Robert Fri, Acting Administrator of the EPA, has been substitued as a defendant in place of William Ruckelshaus since Mr. Ruckelshaus has resigned from his former position as Administrator of EPA.

schedules, and emission limitations . . ." (Complaint para. 42). In paragraph 41 of the complaint, the plaintiff contends that there are "widespread violations of the Kentucky Plan, because of the inability of the Commonwealth of Kentucky to effectively enforce its rules and regulations."

Since, as is held above, the defendants correctly construed their responsibility with respect to applying for a state permit, the plaintiff's claim against the EPA and its officers does not state a claim upon which relief can be granted, for it was based on the assumption that the defendants misconceived their duty with respect to applying for permits. In any event, Section 113(a) of the Clean Air Act clearly grants the Administrator discretionary authority and, consequently, the Administrator's failure to take action under Section 113(a) is unreviewable since it was agency action "committed to agency discretion by law." 5 U.S.C. sec. 701. *See eg., United States* v. *Walker*, 409 F.2d 477 (C.A. 9, 1970).

SOVEREIGN IMMUNITY

All defendants have vigorously asserted that the doctrine of sovereign immunity is a barrier to the plaintiff's suit. Since the doctrine is applicable it serves as an alternate basis for this Court's order.

Although the plaintiff listed in its complaint a number of statutes as the basis for this Court's jurisdiction in

the matter,[6] the plaintiff has apparently chosen to rely upon the Clean Air Act of 1970, 42 U.S.C. Section 1857 *et seq.*, with respect to the question of waiver of sovereign immunity.[7]

The sovereign immunity argument may best be analyzed in two steps. The first consideration is whether this suit, although in form against officers and agencies of the Federal Government, is actually a suit against the sovereign. Once we determine that this suit is against the sovereign, then we must also determine whether there has been a waiver of sovereign immunity in this instance.

To determine whether this suit against officers and agencies of the Federal Government must be treated as a suit against the sovereign, this Court is required to consider whether the suit would expend itself "on the public treasury or interfere with the public administration."

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6. The plaintiff alleges, on page one of its complaint, that "(T)his action arises under the Fifth, Ninth, and Fourteenth Amendments of the Constitution of the United States of America; U.S.C. 42 Section 1331; U.S.C., Title 42, Section 1857, et seq.; U.S.C., Title 5, Section 702; U.S.C., Title 28, Section 2201, et seq., and U.S.C., Title 28, Section 1361."

7. The defendants argued that the statutes listed in footnote six supra, did not vest this Court with jurisdiction. In its memoranda opposing the defendants' motions to dismiss and for summary judgment, the plaintiffs relied entirely on the Clean Air Act and did not urge that this Court had jurisdiction under any of the other statutes which it had invoked in its Complaint.

Dugan v. *Rank*, 372 U.S. 709, 620-621 (1963). For if the relief sought would interfere in a substantial way with important government functions, the suit, although nominally directed against individuals, is "a suit against the Government over which the court, in the absence of consent, has no jurisdiction." *Larson* v. *Domestic and Foreign Corporation*, 337 U.S. 782, 688 (1949).[8] In referring to sovereign immunity, the Sixth Circuit recently said:

> Perhaps the minimum statement of that doctrine is that litigation must not be allowed to stop government in its tracks. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 704, 69 S. Ct. 1457, 93 L.Ed. 1628 (1949). In this regard the effect of the action upon the sovereign rather than its form is controlling. The fact that the defendants are all named as individuals does not change the result. [*Ogletree* v. *McNamara*, 449 F.2d 93 (C.A. 6, 1971)].

The question which this Court must address is whether this suit is barred because the relief which the plaintiff requests would interfere with basic functions of national defense and the carrying onward of congressionally authorized activities. Even Professor Davis, one of the

8. The sovereign immunity doctrine is also applicable to the Union Carbide Corporation since the Complaint herein only concerns Union Carbide's role as a contractor whose actions are subject to the direction and control of the Atomic Energy Commission. See *Varson v. Roane*, Anderson Co., 342 U.S. 232, 236 (1952); *United States v. Boyd*, 378 U.S. 39 (1964).

foremost critics of the sovereign immunity doctrine, has acknowledged that:

> The most persuasive reason for sovereign immunity that has been found in reports of cases is a remark in a dissenting opinion of 1882, that "The sovereign should not, without its consent, be dispossessed by judicial process of forts, arsenals, military posts, and ships of war, necessary to guard the national existence against insurrection and invasion . . ." [*United States* v. *Lee*, 106 U.S. 196, 226 (1882)] Judicial interference would surely be harmful if the government were dispossed of its military bases and equipment during an emergency. [K. Davis, Administrative Law Text 498 (3d ed. 1972)].

This Court is persuaded that, if the plaintiff's arguments were accepted, the plaintiff could, although it disavows any intention of doing so, interfere with the execution of important Federal actions. In reaching the above conclusion, this Court has not ignored the provision, in Section 118 of the Act, that "[t]he President may exempt any emission source of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so . . . ." The foregoing provision does not dispel the possibility that the plaintiff's permit powers, if applied to the defendants, might seriously interfere with important Federal functions. First, Section 118 limits the President's authority to grant an exemption to situations where the President has "requested such appropriation [for air pollution control] as a part of the budgetary process and

the Congress shall have failed to make available such requested appropriation." Moreover, the President is not empowered to grant exemptions with respect to new stationary sources. It is readily apparent, therefore, *that Section 118 does not grant the President sufficient authority to sweep aside all interference with vital Federal functions which may arise if the plaintiff were allowed to impose its permit power on the defendants.* The rationale supporting sovereign immunity in this case is, therefore, undiminished.

With respect to the question of whether Congress has waived the sovereign immunity of the United States, only a brief examination of the statutes relied upon by the plaintiff, with the exception of the Clean Air Act, is necessary.

28 U.S.C. Section 1331 has never been construed as a waiver of the sovereign immunity of the United States from suit. *E.g., Anderson* v. *United States*, 225 F.2d (C.A. 5, 1956); *Cotter Corporation* v. *Seaborg*, 370 F.2d 686 (C.A. 10, 1966). Moreover, the Declaratory Judgment Act, 28 U.S.C. Sections 2201, 2202, is procedural in nature and does not enlarge the jurisdiction of the district courts or waive the sovereign immunity of the United States. *E.g., White* v. *Administrator of General Services Admin.*, 343 F.2d 444 (C.A. 9, 1965); *Donnely* v. *Mavar Shrimp & Oyster Co.*, 190 F.2d 409 (C.A. 5, 1951). As has been decided on many occasions, 28 U.S.C. Section 1361 did not waive sovereign immunity since it was only intended to ease the burden of proceeding against officials formerly suable only in the District of Columbia. *E.g.,*

Jarrett v. *Resor*, 426 F.2d 213 (C.A. 9, 1970); *Carter* v. *Seamans*, 411 F.2d 767 (C.A. 5, 1969). Although the plaintiff also invokes the Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States, it is settled beyond doubt that constitutional provisions have no effect upon the sovereign immunity from suit. *E.g., Lynch* v. *United States*, 292 U.S. 599 (1934).

The plaintiff also cites the Administrative Procedure Act, 5 U.S.C. Section 703, *et seq.* In the Sixth Circuit, the A.P.A. is not deemed an independent grant of jurisdiction or a waiver of sovereign immunity. *Sierra Club* v. *Hickel*, 467 F.2d 1048, 1054 (C.A. 6, 1972),[9] *cert. den.* 41 U.S.L.W. 3525.

We now arrive at the critical question concerning waiver of sovereign immunity; whether Congress intended, by anacting the Clean Air Act, to waive the Federal Government's immunity from a suit attempting to compell officers in charge of Federal installations to obtain state permits for equipment which discharges pollutants into the ambient air. The plaintiff contends that, by enacting Section 118 of the Clean Air Act, 42 U.S.C. sc. 1857f, Congress waived the sovereign immunity of the United States. Section 118 does not expressly waive the sovereign immunity of the Federal Government. The

9. After thoroughly reviewing the relationship of the A.P.A. to the doctrine of sovereign immunity, the Fourth Circuit also concluded that "the doctrine of sovereign immunity applies independently of the judicial review provisions of the A.P.A." *Littet v. Morton*, 445 F2d 1207, 1213 (C.A. 4, 1971).

plaintiff has attempted to overcome the absence of express language concerning waiver by quoting from the debate on the House and Senate versions of the Clean Air Act of 1970. Putting aside the small weight which is usually given to debate on the floor in resolving questions of statutory interpretation, the debate upon which the plaintiff relies simply does not address the question of whether Congress intended that Federal installations must submit permit applications to states which have incorporated a permit provision in their implementation plans.

In two sections of the Clean Air Act, Congress provided judicial remedies and, in so doing, waived the sovereign immunity of the United States. Section 304 and 307: 42 U.S.C. sections 1857h-2 and 1857h-5. It is axiomatic, however, that a waiver of sovereign immunity is coextensive with the remedies which Congress provided. That Congress did not provide a remedy with respect to the Government's decision that a state permit need not be obtained must be carefully noted.

For the reasons discussed above, it is obvious that Congress did not unequivocally waive the sovereign immunity of the United States from suits attempting to compel its officers to obtain permits from state agencies before discharging, from Federal facilities under their control, substances into the ambient air.

It has been settled law since *McCulloch* v. *Maryland* 17 U.S. (4 Wheat.) 316 (1819), that by virtue of Article VI, clause 2 of the Constitution there is an entire absence of power on the part of the states to subject instrumentalities of the Federal government to state regulation or control. And, as said in *Mayo* v. *United States*, 319 U.S. 441 (1943):

> This freedom is inherent in sovereignty . . . where . . . Congress does not *affimatively declare its instrumentalities or property subject to regulation* or taxation *the inherent freedom continues* [pp. 447-48].

An intention by Congress to depart from this long settled principle *cannot be inferred or implied*. In the words of the Supreme Court, there must be a *"clear* congressional mandate." *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 122 (1954). "Cannot be implied but must be unequivocally expressed." *United States* v. *King*, 395 U.S. 1, 4 (1969). *Soriano* v. *United States*, 352 U.S. 270 (1957)

If the Congress intended such a mandate in the present situation, we must assume that it would have said so *plainly*, as it has done when it did so intend.[10]

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10. See for example, section 10 of the Federal Control Act (40 Stat. 456 (1918), which provides in pertinent part:

> "That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law . . . . Actions at law or suits in equity may be brought by and against such carriers . . . and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government."

See also section 304 of the Clean Air Act, 42 U.S.C. §1857h-2 (1970).

Since the plaintiff has not shown an "unequivocal waiver" of sovereign immunity, its arguments concerning waiver are not persuasive.

PROCEDURAL ASSERTIONS

The TVA defendants additionally raised two procedural defenses:

(1) Whether the Attorney General of Kentucky had the power to maintain this action absent the request and consent of the Kentucky Air Pollution and Control Commission, and

(2) Whether the action, which purports to be a Class Action on behalf of "all citizens, counties, political subdivisions and agencies of the Commonwealth of Kentucky," is maintainable as a Class Action.

For the benefit of our judicial superiors on appeal we wish to clearly express our reaction to the above that they might have before them laid out cold our entire reaction, thus:

As to No. (1) above. The dispute centers around the meaning of KRS 224.991, which provides in part as follows:

> (2) It shall be the duty of the Attorney General, *upon the request of the commission* . . . to bring an action for an injunction against any person . . . violating or threatening to violate any order or determination of the commission . . . .
>
> * * *

> (4) The authority herein vested in the Attorney General, *upon request of the commission*, to bring actions for injunctions . . . shall be exclusive.

It is undisputed that no such request has been made by the Commission, and that, in fact, TVA was engaged in discussions with the Commission concerning TVA's interpretation of Section 118 at the time this action was filed. The Attorney General admits that the General Assembly can restrict his authority to bring actions, but contends that KRS 224.991 is not such a restriction. He contends that the statute merely makes it his duty to bring actions upon the Commission's request, but does not expressly prohibit him from bringing actions without such a request. Although the matter is not free from doubt, the Court is inclined to agree that in the circumstances of this case, the Attorney General can maintain the action without a request from the Commission.

As to the Class Action assertion, the TVA defendants maintain that this action cannot be brought as a Class Action. The Court agrees. KRS 224.991(4) provides:

> *The authority herein vested in the Attorney General . . . to bring actions for injunctions for violations of* KRS 224.310 to 224.460 or of *any regulation*, or order issued thereunder, *shall be exclusive.* Nothing herein contained shall abridge the right of any person to recover actual compensatory damages resulting from any such violation.

Such language clearly shows the intention of the Kentucky General Assembly to debar actions for ***injunctive*** relief from alleged violation of Commission regula-

tions to *all* entities in Kentucky *except* the Attorney General acting on behalf of the Commission, who has "exclusive" power to seek such relief. Moreover, any duty to obtain a permit under these regulations is owed *only to the Commission,* not to "all citizens, counties, political subdivisions and agencies of the Commonwealth." There are no questions of law or fact common to the alleged class, and plaintiff is not a member of the class sought to be represented. The action is not a proper class action under Rule 23. FED.R.Civ P.

Plaintiff seeks to justify a class action on the basis of Section 304 of the Clean Air Act, 42 U.S.C. §1857h-2, which provides in part:

> Except as provided in subsection (b) of this section, any person may commence a civil action *on his own behalf* . . . .

Not only does this statute not provide for class actions, but its legislative history expressly states that such actions are prohibited. Section 304 originated in S. 4358, 91st Cong., 2d Sess. (1970). The Senate Committee Report on that section states:

> *Section 304 does not authorize a "class action."* Instead, it would authorize a private action by any citizen or citizens acting *in their own behalf.* [S.Rep. 91-1196, 91st Cong., 2d Sess. 38 (1970)]

This section pertaining to citizen suits was adopted by the Conference Committee and was enacted into law as Section 304 of the Clean Air Act. Accordingly, this action

cannot be maintained as a class action under either Rule 23 or the Clean Air Act.

Accordingly, the Court is of the opinion that all motions of all defendants for summary judgment are due to be denied. A separate judgment to such effect will be entered herewith.

SO ORDERED.

August 10, 1973

/s/ James F. Gordon
JAMES F. GORDON
United States District Judge

Copies to:
Counsel of record.

* * * * * * *

APPENDIX B

Received Jun 6, 1974

No. 73-2099

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

COMMONWEALTH OF KENTUCKY,
Ex Rel., ED HANCOCK, Attorney
General, Plaintiff-Appellant,

v.

WILLIAM D. RUCKELSHAUS, Administrator of the Environmental Protection Agency, et al., Defendants-Appellees.

Appeal from the United States District Court for the Western District of Kentucky

Decided and Filed June 5, 1974.

Before: WEICK and LIVELY, Circuit Judges; and CECIL, Senior Circuit Judge.

LIVELY, Circuit Judge. This case is concerned with the Clean Air Act Amendments of 1970 (the Act), and more particularly with the meaning of section 118 there-

of, 84 Stat. 1689, 42 U.S.C. § 1857.[1] The Attorney General of Kentucky brought this action against various federal departments and agencies which operate facilities within the State that employ pollutant emitting equipment. Included among the defendants were the Secretary of the Army and various Army officers, the chairman of

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1. Section 118 provides:

> Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements. The President may exempt any emission source of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so, except that no exemption may be granted from section 1857c—6 of this title, and an exemption from section 1857c—7 of this title may be granted only in accordance with section 1857c—7(c) of this title. No such exemption shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requehted appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting each such exemption.

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the Board of Directors of the Atomic Energy Commission (AEC) and various officials of that agency and the managing officers of the Tennessee Valley Authority (TVA). The complaint recited that a "Kentucky Plan" for implementation of air quality standards had been adopted, and approved by the Environmental Protection Agency (EPA), and that the plan included a regulation which requires the owners and operators of air pollutant emitting equipment to apply for and obtain from the Kentucky Air Pollution Control Commission (Commission) "a permit to operate their air contaminant equipment."[2] Stating that the defendants had refused to apply for and obtain such permits, the plaintiff asked for an order directing them to do so and that they be permanently restrained from refusing to comply with the provisions of section 118 of the Act.

Also named defendants were the Administrators of EPA and the regional administrator whose responsibility includes Kentucky. It was complained that these defendants had refused to initiate appropriate actions against the previously named defendants to require their compliance with the permit requirements of the Ken-

2. Administrative Regulation NO. AP-1, §5 provides:
(1) No person shall construct, modify, use, operate, or maintain an air contaminant source or maintain or allow physical conditions to exist on property owned by or subject to the control of such person, resulting in the presence of air contaminants in the atmosphere, unless a permit therefor has been issued by the Commission and is currently in effect.

tucky Plan. It was alleged that section 113 of the Act[3] requires the EPA administrators to proceed in the manner requested. The relief sought against these defendants was entry of an order directing them to commence an action under section 113 to obtain full compliance by

3. Section 113 (42 U.S.C. §1857c-8) provides, in part, as follows:

(a) (1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any requirement of an applicable implementation plan, the Administrator shall notify the person in violation of the plan and the State in which the plan applies of such finding. If such violation extends beyond the 30th day after the date of the Adminstrator's notification, the Administrator may issue an order requiring such person to comply with the requirements of such plan or he may bring a civil action in accordance with subsection (b) of this section.

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of an applicable implementation plan are so widespread that such violations appear to result from a failure of the State in which the plan applies to enforce the plan effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the 30th day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such plan (hereafter referred to in this section as "period of federally assumed enforcement"), the Administrator may enforce any requirement of such plan with respect to any person—

(A) by issuing an order to comply with such requirement, or

(Continued on next page)

the other defendants with the permit requirement. In addition, a declaratory judgment was sought to the effect that the defendant operators of federal facilities do not have the right to refuse to comply with the permit regulations of the Kentucky Plan and that the EPA defendants, with knowledge of widespread violations by the other federal defendants, do not have a right to fail to initiate appropriate action under section 113.

All defendants filed motions to dismiss or for summary judgment. The plaintiff also filed a motion for summary judgment and various parties filed affidavits in support of their motions. Although plaintiff did not concede that all the federal facilities in Kentucky are in compliance with air pollution emission standards or have adopted schedules which will bring them into compliance, the district court determined that resolution of this is-

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(Continued from previous page)

(B) by bringing a civil action under subsection (b) of this section.

* * *

(b) The Administrator may commence a civil action for appropriate relief, including a permanent or temporary injunction, whenever any person—

(1) violates or fails or refuses to comply with any order issued under subsection (a) of this section; or

(2) violates any requirements of an applicable implementation plan (A) during any period of Federally assumed enforcement, or (B) more than 30 days after having been notified by the Administrator under subsection (a) (1) of this section of a finding that such person is violating such requirement;

sue was not required for decision of the case. Upon consideration of the cross-motions, District Judge James E. Gordon granted summary judgment to the defendants and dismissed the action.

The issues on appeal are narrow. In the first place, the appellant contends that section 118 of the Act "requires that those persons in charge of the administration and operation of air contaminant sources owned or operated by the federal government comply with all state requirements respecting the control and abatement of air pollution including Kentucky's permit requirements." The appellees maintain that section 118 requires compliance with substantive provisions of the Kentucky Plan, but does not compel federal officials to obtain state or local permits for the operation of federal facilities. It is the position of the appellant that the permit requirement is substantive in nature because the Kentucky Plan is so formulated that the State cannot meet its primary responsibility under the Clean Air Act without the use of permits. To this the appellees respond that they are willing to supply, and in fact have supplied, the information sought on the permit application form, but will not seek the permit itself.

It is agreed by the parties that section 304 of the Act[4] provides a means by which the United States may

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4. Section 304 (42 U.S.C. § 1857h-2) provides in pertinent part:

(a) Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf—

(Continued on next page)

be sued for violation of an emission standard or limitation, or order with respect thereto. The appellant argues that this provision only permits abatement actions and that the Commission needs to be able to prevent air pollution as well as abate violations. It is maintained that the permit device is the only means by which the State can exercise preventive control over polluters. The language of section 304 does not require that suit be deferred until an actual violation of an established emission standard occurs. Sub-section (f)(1) clearly permits the filing of an action for violation of a schedule or timetable of compliance. Thus, it is not necessary

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(Continued from previous page)

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

* * *

Definition

(f) For purposes of this section, the term "emission standard or limitation under this chapter" means—

(1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard,

under section 304, that the State or other aggrieved party wait until an emission standard is violated to bring suit. It may be done at the first instance where the owner or operator of polluting equipment fails to meet a level prescribed in a schedule or timetable of compliance. Such an action would surely be preventive in nature.

Both the doctrine of sovereign immunity and the application of the Supremacy Clause of the Constitution are involved in the decision of this case. We view the action against the non-TVA defendants as a suit against the United States. The sovereign can only act through its agents, and the relief sought in this case does not seek to impose personal liability of the named defendants, but rather would affect public administration *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688-689 (1949); *Land* v. *Dollar*, 330 U.S. 731, 738 (1947). Every declaration of a waiver of sovereign immunity must be strictly construed. *United States* v. *Sherwood*, 312 U.S. 584, 590 (1941). Section 118 contains no waiver and that included in section 304 does not permit suit to require owners and operators of federal facilities to obtain permits from a state agency in order to continue to operate. The two sections are part of the same Act and must be read together. By failing to include a separate waiver of immunity in section 118 Congress indicated that compliance with its provisions may be compelled by suit only to the extent permitted by section 304. This section provides ample means for enforcement of air quality and emission standards.

The TVA defendants do not claim sovereign immunity from suit, but do maintain that the Supremacy

Clause of the United States Constitution exempts federal agencies and officials in the performance of their duties from state and local regulations. From the time of *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), this has been a settled principle of our federalism. See *Mayo* v. *United States*, 319 U.S. 441, 445-448 (1943). The doctrine has been held applicable to TVA. *Posey* v. *Tennessee Valley Authority*, 93 F.2d 726, 727 (5th Cir. 1937). The appellant argues that Congress determined in this instance to submit federally owned and operated facilities to state regulation by providing, in section 118, that agencies of the federal government "shall comply" with state requirements. This does not necessarily follow. An examination of the legislative history of the 1970 Act reveals no congressional intent to subject federal instrumentalities and agencies to state administrative regulations. Separate House and Senate bills were interpreted in the respective Reports as requiring federal agencies to comply with applicable "emission standards" and the Joint Conference Report stated that the House bill and Senate amendment which became section 118 "declared that Federal departments and agencies should comply with applicable standards of air quality and emissions." This language appears to us to refer only to substantive requirements and not to encompass the Kentucky regulation which requires permits. In the absence of a clear congressional purpose to subject federal agencies to state regulation, the district court was prevented by the Supremacy Clause from granting the injunctive relief sought by the plaintiff.

The plaintiff also relies on Executive Order No. 11507 which was issued on February 4, 1970 as authority for the proposition that the federal agencies and instrumentalities sued here are required to obtain Kentucky permits. This Executive Order, while in force, was never so construed by the Environmental Protection Agency, as shown by documents filed in connection with the motions for summary judgment. Such administrative construction is entitled to great weight particularly when it is supported by the legislative history of the Act to which the Order refers. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434 (1971). Furthermore, the order in question was superseded by Executive Order No. 11752 on December 17, 1973 which contains this policy statement:

> SECTION 1. *Policy*. It is the purpose of this order to assure that the Federal Government, in the design, construction, management, operation, and maintenance of its facilities, shall provide leadership in the nationwide effort to protect and enhance the quality of our air, water, and land resources through compliance with applicable standards for the prevention, control, and abatement of environmental pollution in full cooperation with State and Local governments. Compliance by Federal facilities with Federal, State, interstate, and local substantive standards and substantive limitations, to the same extent that any person is subject to such standards and limitations, will accomplish the objective of providing Federal leadership and cooperation in the prevention of environmental pollution. In light of the principle of Federal supremacy embodied in the Constitution, this order is not intended, nor should it be

> interpreted, to require Federal facilities to comply with State or local administrative procedures with respect to pollution abatement and control.

We find no support in the language of Executive Order No. 11507 for an interpretation of section 118 in accord with plaintiff's contention, and such an interpretation is clearly negatived by the quoted portion of Executive Order No. 11752.

There has been a congressional waiver of immunity with respect to one group of defendants in this action, the EPA administrators. Section 304(a)(2) of the Act (42 U.S.C. § 1857h-2(a)(2)) provides for an action "against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator." The question here is whether the act or duty which the plaintiff sought to have the court order the EPA defendants to perform is mandatory or discretionary. This requires a consideration of the language of section 113 of the Act since the complaint demands that these defendants be "[o]rdered to commence appropriate action under Section 113" to obtain full compliance with the Kentucky Plan. A reading of section 113(a)(1) reveals that that Administrator *shall* give notice to persons in violation of the plan, but that he *may* thereafter issue an order or bring an action under subsection (b). The same language is used in section 113 (a)(2), which deals with widespread violations of an implementation plan. Again, the Administrator is required to give public notice of his finding, but *may* enforce any requirement of the plan by issuing an order or commencing an action under sub-section (b). Section 113(b) uses only the discretionary "may"; the mandatory "shall" does not appear. The district court correctly held that it had no power to review the decision of EPA not to commence actions under section 113 since this was a decision on "agency action committed to agency discretion by law." 5 U.S.C. § 701(a)(2).

A review of the Act as a whole supports the views set forth in this opinion. Congress clearly intended that federal facilities comply with the emission standards and limitations of the state plan where they are located. Such compliance is mandated by section 118 and made enforceable by legal action pursuant to section 304. By defining the term "emission standard or limitation" broadly in section 304(f) Congress provided a means of enforcing all of the substantive provisions of a state plan, for prevention as well as after-the-fact violation. The chief purposes of the Act are "to protect and enhance the quality of the Nation's air resources" (§ 101(b)(1)) and rapidly bring into being "a program to achieve the prevention and control of air pollution." (§ 101(b)(2)). We do not believe the congressional scheme for accomplishment of these purposes included subjection of federal agencies to state or local permit requirements. Congress did commit the United States to compliance with air quality and emission standards, and it is undisputed in this record that the federal facilities in Kentucky have cooperated with the Commission toward this end. The national dedication to improvement of the environment by prevention and control of air pollution is in no way

impeded by exempting federal agencies from the permit requirement of Administrative Regulation No. AP-1, § 5.

The judgment of the District Court is affirmed.

OFFICE OF THE CLERK
JOHN P. HEHMAN
Clerk

* * * * * * *

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
CINCINNATI, OHIO 45202

June 5, 1974.

Mr. Ed W. Hancock
Mr. David C. Short
Mr. David D. Beals
Mr. Wallace H. Johnson
Mr. George J. Long
Mr. G. Wilson Horde
Mr. Robert H. Marquis
Mr. Andrew P. Miller
Mr. John L. Hill
Mr. Robert F. Trevey
Mr. Evelle J. Younger

Re: Commonwealth of Kentucky, ex rel., Ed W. Hancock, Attorney General, Plaintiff-Appellant,

vs.

William D. Ruckelshaus, Administrator of the Environmental Protection Agency, et al., Defendants-Appellees.

Case No. 73-2099

Gentlemen:

Enclosed is a copy of the Court's opinion which was announced today in the above-entitled case.

A judgment in conformity with the opinion has been entered today as required by Rule 36.

Yours very truly,

John P. Hehman, Clerk
/s/Grace Keller
Chief Deputy

Enclosure

* * * * * * *

APPENDIX C

"SEC. 101. (a) The Congress finds—

"(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

"(2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation;

"(3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments; and

"(4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution.

"(b) The purposes of this title are—

"(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

"(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

"(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

"(4) to encourage and assist the development and operation of regional air pollution control programs.

"SEC. 107. (a) Each State shall have the primary responsibility for assuring air quality within the entire geopraphic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

"(b) For purposes of developing and carrying out implementation plans under section 110—

"(1) an air quality control region designated under this section before the date of enactment of the Clean Air Amendments of 1970, or a region designated after such date under subsection (c), shall be an air quality control region; and

"(2) the portion of such State which is not part of any such designated region shall be an air quality control region, but such portion may be subdivided

by the State into two or more air quality control regions with the approval of the Administrator.

"(c) The Administrator shall, with 90 days after the date of enactment of the Clean Air Amendments of 1970, after consultation with appropriate State and local authorities, designate as an air quality control region any interstate area or major intrastate area which he deems necessary or appropriate for the attainment and maintenance of ambient air quality standards. The Administrator shall immediately notify the governors of the affected States of any designation made under this subsection.

"SEC. 110. (a)(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 109 for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing provided, each State shall consider its plan implementing such sec-

ondary standard at the hearing required by the first sentence of this paragraph.

"(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan for each portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

"(A)(i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e)) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

"(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls;

"(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile,

and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

"(D) it includes a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

"(E) it contains adequate provisions for intergovernmental cooperation, including measures necessary to insure that emissions of air pollutants from sources located in any air quality control region will not interfere with the attainment or maintenance of such primary or secondary standard in any portion of such region outside of such State or in any other air quality control region;

"(F) it provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan, (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources, (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this Act, which reports shall be available at reasonable times for public inspection; and (v) for authority comparable to that in section 303, and adequate contingency plans to implement such authority;

"(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards; and

"(H) it provides for revision, after public hearings, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or (ii) whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements.

"SEC. 113. (a)(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any requirement of an applicable implementation plan, the Administrator shall notify the person in violation of the plan and the State in which the plan applies of such findings. If such violation extends beyond the 30th day after the date of the Administrator's notification, the Administrator may issue an order requiring such person to comply with the requirements of such plan or he may bring a civil action in accordance with subsection (b).

"(2) Whenever, on the basis of information available to him, the Administrator finds that violations of an applicable implementation plan are so widespread that such

violations appear to result from a failure of the State in which the plan applies to enforce the plan effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the thirtieth day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such plan (hereafter referred to in this section as 'period of Federally assumed enforcement'), the Administrator may enforce any requirement of such plan with respect to any person—

"(A) by issuing an order to comply with such requirement or

"(B) by bringing a civil action under subsection (b).

"SEC. 116. Except as otherwise provided in sections 209, 211(c)(4), and 233 (preempting certain State regulation of moving sources) nothing is this Act shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 111 or 112, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

"SEC. 118. Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall compy with Federal State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements. The President may exempt any emission source of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so, except that no exemption may be granted from section 111, and an exemption from section 112 may be granted only in accordance with section 112(c). No such exemption shall be granted due to lack of appropriation unless the President shall have specificially requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting each such exemption.

"SEC. 304. (a) Except as provided in subsection (b), any person may commence a civil action on his own behalf—

"(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

"(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be.

"(b) No action may be commenced—

"(1) under subsection (a) (1)—

"(A) prior to 60 days after the plaintiff has given notice of the violation (i) to the Administrator, (ii) to the State in which the violation occurs, and (ii) to any alleged violator of the standard, limitation, or order, or

"(B) if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to

require compliance with the standard, limitation, or order, but in any such action in a court of the United States any person may intervene as a matter of right.

"(2) under subsection (a) (2) prior to 60 days after the plaintiff has given notice of such action to the Administrator, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of section 112(c) (1) (B) or an order issued by the Administrator pursuant to section 113(a). Notice under the subsection shall be given in such manner as the Administrator shall prescribe by regulation.

"(c) (1) Any action respecting a violation by a stationary source of an emission standard or limitation or an order respecting such standard or limitation may be brought only in the judicial district in which such source is located.

"(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

"(d) The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

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"(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

"(f) For purposes of this section, the term 'emission standard or limitation under this Act' means—

> "(1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard, or
>
> "(2) a control or prohibition respecting a motor vehicle fuel or fuel additive,

which is in effect under this Act (including a requirement applicable by reason of section 118) or under an applicable implementation plan.

KENTUCKY ADMINISTRATIVE REGULATION

AP-1 SECTION 5

(1) No person shall construct, modify, use, operate, or maintain an air contaminant source or maintain or allow physical conditions to exist on property owned by or subject to the control of such person, resulting in the presence of air contaminants in the atmosphere, unless a permit therefor has been issued by the Commission and is currently in effect.